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Introduction to Federal Administrative Law Part I: The Exercise of Administrative Power and Judicial Review, An

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An Introduction to Federal Administrative Law Part I: The Exercise of Administrative Power and Judicial Review

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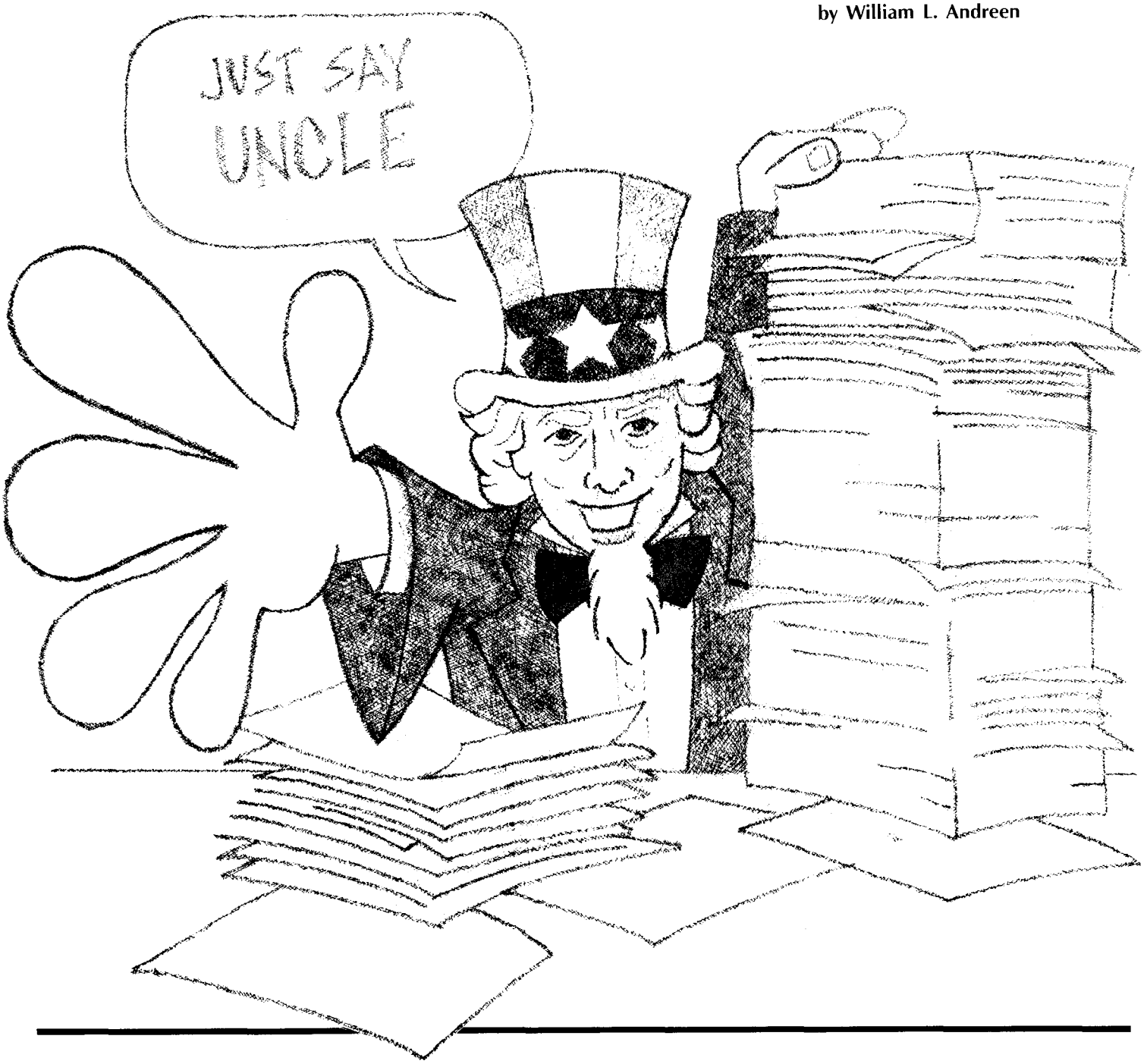

(Part one of a two-part series; the second article will appear in the January 1990 *Alabama Lawyer.*)

This century has witnessed the rise of an enormous federal bureaucracy. The impact of this bureaucracy on contemporary life and affairs is staggering. From the provision of social security benefits to the distribution of highway funds to the regulation of air and water pollution, the presence of the federal government is felt at virtually every conceivable level of American society. It would be no exaggeration, therefore, to say that our nation is an administrative state. Moreover, the most salient feature of that administrative state lies in the sheer number, power and diversity of federal administrative agencies.

The administrative state, however, did not suddenly blossom forth during the 20th century. Its roots are much older. As early as 1789, Congress passed two statutes which placed significant administrative responsibility in the hands of federal agencies.[1] Nevertheless, the administrative branch of the federal government grew slowly until the pace of industrialization began to quicken during the latter half of the 19th century.[2] As the need to control monopolies, protect public health and regulate trade grew, Congress increasingly turned to administrative bodies to which it could delegate authority to care for the day-to-day details of governing. Thus, the first modern administrative agency, the Interstate Commerce Commission, was created in 1887. Building upon that model, Congress broadened its regulatory oversight during the early 20th century to include food and drugs, shipping, unfair competition and nascent industries such as radio.

The New Deal led to a tremendous expansion of regulatory power at the federal level. Regulation was extended to the securities markets, labor relations, trucking and the airlines. The 1960s and 1970s, furthermore, saw another leap in regulatory activity, this time focusing primarily on environmental protection, consumer safety and social welfare. As a result of all of these developments, the role of federal administrative agencies looms large today in the articulation and implementation of public policy in the United States.

Legal theory, however, was rather slow in responding to the rise of the administrative state. It was not until the Administrative Procedure Act (APA) of 1946[3] that a uniform set of legal principles was adopted for application to federal agencies. The APA has become the foundation on which the field of federal administrative law stands. From that basic foundation, Congress and the federal courts have continued to struggle with the question of how to control the vast and pervasive authority placed in the hands of executive branch agencies.

This article is the first in a two-part series on federal administrative law that is designed as a primer for the general practitioner. Part I in this series will focus upon the exercise of rulemaking and adjudicatory power by federal agencies and the standards used by the federal judiciary in reviewing administrative decisionmaking. Part II, in turn, will discuss the threshold problems involved in obtaining judicial review of agency action.

I. The exercise of administrative power

A. The distinction between rulemaking and adjudication

The conventional way to introduce the methods by which agencies act is to distinguish administrative rulemaking from adjudication. Rulemaking is often described as quasi-legislative action since it resembles the manner in which a legislature enacts a statute. Rulemakings are aimed at developing policy standards and norms for future application. The procedures for rulemaking therefore are designed to solicit general facts and a broad range of opinion. Administrative adjudication, on the other hand, is commonly termed quasi-judicial due to its affinity for judicial process. Adjudications often involve a determination of whether a party acted in accordance with an existing legal norm and, therefore, are typically retrospective in nature and accusatory in flavor.

1. Under the Constitution

Two early Supreme Court decisions indicate, at least in a general way, when an agency may use quasi-legislative procedures or must use quasi-adjudicative procedures. In *Londoner v. Denver*,[4] a city agency ordered the paving of a street and assessed the cost to the neighboring landowners. Since some of the lots were irregular in shape, the agency was not able to consistently apply a simple rule relating cost to front-footage. The agency, however, relied upon a quasi-legislative model to apportion the costs and thus gave the landowners notice and an opportunity to comment only in writing. Their request for an oral hearing was denied.[5] Without much analysis, the Court held that the refusal to grant an oral hearing constituted a violation of due process.[6] Rather than relying upon quasi-legislative procedures, the situation demanded quasi-adjudicative proce-

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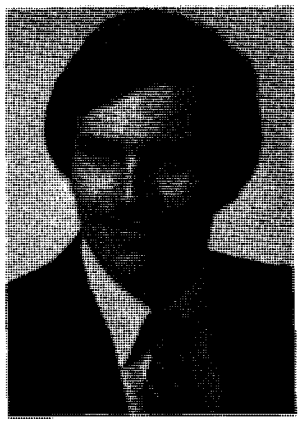

dures that would afford the landowners an opportunity for oral argument and the presentation of evidence.

On the other hand, *Bi-Metallic Investment Co. v. State Board of Equalization*[7] involved an order by a state agency that increased the value of all taxable property in Denver by 40 percent. Although the agency gave the taxpayers no opportunity to be heard and the order clearly deprived the taxpayers of property through increased taxation, the Court found no constitutional infirmity. Justice Holmes distinguished *Londoner* by saying that in that instance a relatively small group of persons was involved, who were affected in individually unique ways.[8] The agency, therefore, was actually engaged in adjudicatory action judging different persons on the basis of divergent and disputed facts. By contrast, *Bi-Metallic* concerned a general rule that applied to all landowners in the same way. Thus, the agency was making a policy-oriented decision which was more legislative in character.

2. Under the Administrative Procedure Act

Building upon this constitutional distinction, administrative action under the Administrative Procedure Act[9] is characterized as either rulemaking or adjudication. The object of rulemaking, of course, is the establishment of standards for future application rather than the evaluation of a particular person's past conduct or eligibility for a license or permit. Consequently, the issues in a rulemaking do not generally relate to specific evidentiary facts, but focus upon policy-type conclusions which are drawn from a wide variety of sources. Adjudication, on the other hand, usually involves a factually-oriented determination as to whether a party's past conduct was lawful or whether a party is entitled to a permit or license.

B. Rulemaking under the Administrative Procedure Act

1. Informal rulemaking

Informal rulemaking is the most common way in which regulations are promulgated at the federal level. Informal rulemaking, also known as notice-and-comment rulemaking, requires an agency to publish a notice of proposed rulemaking in the Federal Register setting forth, *inter alia*, the terms or substance of the proposal.[10] Following this notice, the agency must "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation."[11] An agency is under no obligation to hold oral hearings with regard to an informal rulemaking, although, in its discretion, an agency may decide to do so.

After considering the relevant material presented by the public, the agency must publish both the final rule and "a concise general statement" of the rule's basis and purpose which is generally referred to as a preamble.[12] In many instances, the final rule is then subject to judicial review.

Most preambles, in recent years, have been much more detailed than the words "concise general statement" would suggest. This has occurred because the federal courts during the 1970s began to demand a reasoned elaboration of an agency's thinking to aid the judiciary in reviewing complicated rulemakings.[13] Furthermore, the preamble also must respond to well-supported, material arguments made by the public during the comment period.[14] Thus, the courts can determine whether an agency is truly considering the comments made by the public.

Informal rules promulgated pursuant to notice-and-comment procedures are substantive law, binding on agencies, courts and private parties.[15] However, an agency may adopt interpretive rules, procedural rules and general statements of policy without satisfying the requirements of notice-and-comment rulemaking.[16] Such rules, though, do not have the force of law and are not binding.[17]

2. Formal rulemaking

Under the APA, informal rulemaking procedures apply to all substantive rules unless a rule is "required by statute to be made on the record after opportunity for an agency hearing."[18] An agency, therefore, must use formal rulemaking procedures when its enabling statute so requires.

Formal rulemaking begins the same way as informal rulemaking—with public notice of the proposed rule.[19] After notice, however, the requirement for public comment is replaced with procedures which are nearly identical to those called for in a formal adjudication.[20] Thus, the agency, must hold an evidentiary hearing where the parties have the right to present oral and documentary evidence and cross-examine witnesses.[21] Unlike most formal adjudications, however, the agency may decide to receive all or part of the evidence in written form as long as a party would not be prejudiced.[22] At the conclusion of the hearing, the agency must base its findings and conclusions solely upon the evidentiary record produced during the course of the proceeding.[23]

Formal rulemaking generally involves broad, complicated questions of policy which will affect substantial numbers of people. Formal trial-type procedures, however, are better designed to resolve factual disputes between a few parties rather than to promulgate rules. Hence, formal rulemakings typically grind on very slowly with dozens of parties presenting witnesses and dozens of parties conducting cross-examination. The requirement of formal rulemaking, thus, often will result in a procedural morass and, eventually, the abandonment or relaxation of a regulatory program.

Perhaps as a reaction to these difficulties, the presumption in rulemaking cases favors the use of informal procedures. Formal rulemaking, therefore, is triggered solely by a statutory provision that (1) refers to a hearing and (2) recites the words "on the record" or some equivalent that clearly reveal the intent of Congress to require formal procedures.[24]

C. Adjudication under the Administrative Procedure Act

1. Formal adjudication

The APA requires the use of formal adjudication only in cases of an "adjudication required by statute to be determined on the record after opportunity for an agency hearing."[25] Affected persons must be given notice of the hearing, which includes: (1) the time, place and nature of the hearing, (2) the legal authority for the hearing, and (3) the matters of law and fact asserted.[26] Following notice, the opposing parties are given a chance to respond by submitting legal arguments and statements of fact.[27]

Formal adjudications are presided over by the agency, one or more members of the body that comprises the agency, or an Administrative Law Judge (ALJ).[28] In most cases, however, the presiding officer is an ALJ. Although ALJs are agency employees, they possess a great deal of independence. Their compensation is fixed, not by the agency, but by the Office of Personnel Management, independent of agency recommendations.[29] Furthermore, ALJs can be disciplined only for "good cause" by the Merit Systems Protection Board.[30] ALJs are assigned to cases in rotation and may not perform duties which are incompatible with their judicial responsibilities.[31] Finally, ALJs may not be supervised by an agency official who has an investigative or prosecutorial role.[32]

A party to a formal adjudication may appear in person or through counsel[33] and may present oral or documentary evidence.[34] A party may also cross-examine opposing witnesses to the extent required "for a full and fair disclosure of the facts."[35] ALJs are not required, in most instances, to adhere to the same rules of evidence which apply in federal courts. The APA, in fact, directs an ALJ to receive "[a]ny oral or documentary evidence" as long as it is not "irrelevant, immaterial or unduly repetitious."[36]

Following the evidentiary hearing, the ALJ generally issues an initial decision, which contains the "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record."[37] The initial decision becomes the final decision of the agency unless an appeal is taken to the agency.[38] On appeal, the agency has the power to undertake *de novo* review of the ALJ's initial decision.[39]

2. Informal adjudication

Informal adjudication (or informal action) describes all agency decisions not encompassed by rulemaking or formal adjudication. It often includes the processing of applications and claims, tests and inspections, advice, and similar routine decisions. In fact, the vast bulk of federal decisionmaking can be termed informal adjudication. Due to the wide variety of informal administrative decisions, the APA establishes no procedural framework for informal adjudication. The procedures governing informal adjudication, therefore, will be those, if any, established by statute or by the agency, required by the Constitution or imposed by the judiciary.

D. Agency discretion in choosing a procedural mode

Many agencies often confront a choice between adopting a substantive rule through informal rulemaking or announcing a general principle of law through formal adjudication. Such a choice only will arise, of course, when an agency is vested with the statutory authority to both promulgate substantive rules and adjudicate cases dealing with the same subject matter.

While the federal courts have expressed a strong preference for the rulemaking model when it comes to the creation of law, they recognize that not every new principle of law can be cast in the form of a regulation. Many problems, for example, cannot be anticipated until presented in the context of a real case. Or an agency may not have had enough experience with a problem to establish a rigid rule prior to the adjudication of a concrete controversy. Consequently, the federal courts have not imposed any inflexible requirement that agencies establish general rules of law solely through rulemaking.[40] In short, agencies have discretion to announce a new principle by means of rulemaking or to announce and apply a new principle via adjudication.[41]

II. Judicial review of administrative decisions

A. Questions of law and policy

The APA clearly states that a reviewing court shall decide all relevant questions of law.[42] Thus, if an agency's statutory interpretation is inconsistent with the language of a statute, as viewed in light of its legislative history and its purposes, a court must give effect to the intent of Congress.[43] However, if an agency's interpretation of a statute it administers does

not contradict the statute's language or frustrate its purpose, the role of a reviewing court is limited. The agency's construction will be upheld if it is sufficiently reasonable, even if it is not the most reasonable interpretation in the eyes of the court.[44] The amount of deference shown to an agency's interpretation increases in cases where an agency interpretation was made contemporaneously with the statute's passage, has been consistently adhered to, or involves questions of scientific or technical expertise.[45]

The Supreme Court recently articulated one rationale for this principle of deference. In cases where a statute is silent or ambiguous with respect to a particular issue, the Court believes that Congress has delegated to the administrative agency, rather than the courts, the task of filling the gap. Thus, the agency must make a policy choice, and the federal courts have a duty to respect the legitimate and reasonable policy choices made by an agency.[46]

B. Questions of fact and the exercise of discretion

1. De novo review

De novo review of agency findings of fact to determine whether they are "unwarranted" is authorized by 5 U.S.C. §706(2)(F) in two limited situations. Such independent judicial factfinding is called for (1) when an action is adjudicatory and the agency's procedures for factfinding are inadequate, or (2) when new issues are raised in a proceeding to enforce nonadjudicatory action.[47]

2. Substantial evidence

Reviewing courts will examine an agency's factual findings under the substantial evidence test whenever the agency acted pursuant to sections 556 and 557 of the APA.[48] It is, therefore, applied to the review of formal rulemakings and formal adjudications.[49]

The Supreme Court has defined substantial evidence as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[50] The Court later amplified this definition by holding that a reviewing court may determine whether evidence is substantial only after examining "whatever in the record fairly detracts from its weight."[51] A court, therefore, must consider the record as a whole, taking into account not only the evidence which supports the agency's finding, but any evidence that conflicts with it.

Consistent with the liberal rules of evidence in agency proceedings, hearsay evidence is deemed sufficient to constitute substantial evidence as long as the hearsay is of a type relied upon by reasonably prudent persons in conducting their own affairs.[52]

3. The arbitrary/capricious test

In situations where an agency took action through informal rulemaking or informal adjudication, the APA requires a reviewing court to decide whether the agency's factual decision was arbitrary, capricious, or an abuse of discretion.[53] This standard of review is, theoretically at least, the most deferential form of review. According to the Supreme Court, a court must consider whether the decision was based on a:

> "consideration of the relevant factors and whether there has been a clear error of judgment . . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency . . . ."[54]

In applying this standard, the "focal point for judicial review" is the administrative record that was created at the agency level.[55] Therefore, the validity of the agency's determination rests solely on the administrative record which is already in existence.[56]

C. Hard look review and informal rulemaking in an era of high technology

During the 1970s, informal notice-and-comment rulemaking evolved into a highly visible and significant force in the administrative process. A host of new statutes, many of which involved environmental or consumer protection, were enacted that predicated their regulatory schemes upon a plethora of standards to be established through informal rulemaking procedures. Those rulemakings are often quite complicated, scientifically and technically, and likely involve significant economic and social impacts. Reacting to this development, the federal courts have fashioned a rigorous form of review that is commonly referred to as a hard look.[57]

The origins of this hard look review may be traced to *Citizens to Preserve Overton Park, Inc. v. Volpe*,[58] which called for judicial review under the arbitrary and capricious test that would be "narrow" and yet "searching."[59] While elaborating upon the nature of this test, the D.C. circuit has stated that, although the standard is "highly deferential" to agency findings, it does not require a court to "rubberstamp the agency decision."[60] Thus, especially in highly technical cases, a reviewing court must probe deeply into the administrative record to discern whether the agency has exercised its discretion in reasonable fashion. This heightened type of scrutiny is not intended to allow the court to supplant the agency's technical expertise, but merely to allow the court to understand whether the agency has based its decision upon a consideration of the relevant factors.[61]

In order to perform this task, the courts have required agencies to articulate the grounds for an informal rulemaking (in

the preamble) in far more detail than had been required before 1970.[62] The courts basically want an agency to explain the reasons why it chose one course of action over another, the facts that choice is based upon, and the considerations the agency found persuasive.[63] In addition, the courts have held that agencies possess an obligation to respond to significant comments made during the public comment period.[64]

Potential challengers to agency informal rulemaking have a concomitant obligation in the courts' view. They must realize that the success of open and participatory procedures depends upon them as well as upon the agencies. Consequently, the courts have required challengers to make substantial and good faith use of the opportunities to comment. Therefore, technical, factual or policy concerns should be raised during the comment period. If they are not raised at that time, reviewing courts will give the complaining party rather limited latitude to raise those issues during the course of subsequent judicial review.[65]

The hard look doctrine has also appeared in the context of deregulation. In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,[66] the Supreme Court held that the Department of Transportation had not supplied a sufficiently reasoned analysis for rescinding a rule which required the installation of passive restraint systems in all automobiles. In the decision, the Court summarized the hard look doctrine in the following fashion:

> "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[67]

Thus, the judiciary may be seen not only as a mechanism which guards against the unauthorized expansion of regulatory power, but also as a bulwark against the unjustified dilution or elimination of regulatory standards.

Conclusion

The final article in this series will address the various threshold questions that confront parties seeking judicial review of agency action such as obtaining jurisdiction, statutory preclusion of review, standing and timing. ■

FOOTNOTES

1. 1 Stat. 29 (1789) (providing for the collection of import duties); 1 Stat. 95 (1789) (dealing with the provision of benefits to veterans of the Revolutionary War).
2. *See* J. Landis, *The Administrative Process* 6-8 (1938).
3. 5 U.S.C. §§551-559, 701-706 (1982).
4. 210 U.S. 373 (1908).
5. *Id.* at 385-86.
6. *Id.*
7. 239 U.S. 441 (1915).
8. *Id.* at 446.
9. 5 U.S.C. §§ 551-559, 701-706 (1982).
10. 5 U.S.C. § 553(b).
11. 5 U.S.C. § 553(c).
12. *Id.*
13. *See, e.g., Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972).
14. *See Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-95 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).
15. *See, e.g., United States v. Nixon*, 418 U.S. 683, 695 (1974); *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974).
16. 5 U.S.C. § 553(b).
17. *See, e.g., General Motors Corp. v. Ruckelshaus*, 724 F.2d 979, 985 (D.C. Cir. 1983); *Pacific Gas & Electric Co.*, 506 F.2d at 38-39.
18. 5 U.S.C. § 553(c).
19. 5 U.S.C. § 553(b).
20. *See* 5 U.S.C. § 553(c).
21. 5 U.S.C. § 556.
22. 5 U.S.C. § 556(d).
23. 5 U.S.C. §§ 556(e), 557.
24. *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 241 (1973).
25. 5 U.S.C. § 554(a).
26. 5 U.S.C. § 554(b).
27. 5 U.S.C. § 554(c).
28. 5 U.S.C. § 556(b).
29. 5 U.S.C. § 5372 (1982).
30. 5 U.S.C. § 7521 (1982).
31. 5 U.S.C. § 3105 (1982).
32. 5 U.S.C. § 554(d).
33. 5 U.S.C. § 555(b).
34. 5 U.S.C. § 556(d).
35. *Id.*
36. *Id.*
37. 5 U.S.C. § 557(b), (c).
38. 5 U.S.C. § 557(b).
39. *Id.*
40. *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194 (1947).
41. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).
42. 5 U.S.C. § 706 (1982).
43. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 170-71 (D.C. Cir. 1982).
44. *National Wildlife Fed'n.*, 693 F.2d at 171.
45. *Id.* at 182.
46. *Chevron*, 467 U.S. at 865-66.
47. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).
48. 5 U.S.C. § 706(2)(E).
49. *Citizens to Preserve Overton Park*, 401 U.S. at 414.
50. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229.
51. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).
52. *See Richardson v. Perales*, 402 U.S. 389 (1971).
53. 5 U.S.C. § 706(2)(A).
54. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416.
55. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).
56. *Id.* at 143.
57. *See, e.g., National Lime Ass'n v. EPA*, 627 F.2d 416, 429-30 (D.C. Cir. 1980).
58. 401 U.S. 402 (1971).
59. *Id.* at 416.
60. *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 941 (1976).
61. 541 F.2d at 35-37.
62. *See, e.g., Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 851-52.
63. *See Industrial Union Department, AFL-CIO v. Hodgson*, 499 F.2d 467, 477 (D.C. Cir. 1974); *Lead Industries Ass'n. v. EPA*, 647 F.2d 1130, 1147 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1042 (1980).
64. *See, e.g., Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-95.
65. *See Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978).
66. 463 U.S. 29 (1983).
67. *Id.* at 43.